Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2039

HERMAN LEE PETTY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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HERMAN LEE PETTY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Herman Lee Petty, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Tenth Circuit, entered in the appeal of Herman Lee Petty, from a conviction of possession of a controlled substance in violation of 21 U.S.C. 841(a)(1), on May 28, 1974, to review the order denying the petition for rehearing and the supplement thereto entered June 21, 1974, and to review the judgment of the court entered and transmitted to counsel and the clerk of the District Court from which the appeal was taken July 1, 1974.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is not reported and is set forth in full in the Appendix at page A1. The petition for rehearing appears at page A4, and the supplement to the petition for rehearing appears in the Appendix at page A6. The order denying the motion for rehearing appears in the Appendix at page A8. The judgment of the Court of Appeals appears in the Appendix at page A9.

JURISDICTION

This petition for a writ of certiorari is made to this Court within the time prescribed by Rule 22, Paragraph 2, of this Court and 28 U.S.C. 1254(1). The opinion of the Court of Appeals of the Tenth Circuit was rendered and entered May 28, 1974, and the motion for rehearing and the supplement thereto were denied June 21, 1974, and the judgment of the Court of Appeals was entered July 1, 1974, and on said date transmitted to the Clerk of the trial court and to counsel.

QUESTIONS PRESENTED FOR REVIEW

1. There was no evidence, direct or circumstantial, that petitioner was in possession of a controlled substance (heroin or other controlled drug) nor was there evidence, direct or circumstantial, that petitioner intended to distribute a controlled substance. Therefore, petitioner contends that the evidence is insufficient to support petitioner's conviction.

2. Petitioner's residence was searched after he had been removed from the basement of his home by officers

who held an arrest warrant for a Maurice Wheeler. After taking petitioner into custody, an officer frisked him and took petitioner to the rear yard of his home and placed him in the custody of other officers. The officer who removed petitioner from the basement of his home then re-entered the basement and together with other officers conducted a search therein, the officers later searched the main, or first, floor of petitioner's residence—a one-story house. Petitioner contends that the search after he was removed from his home was not incident to his arrest; and, therefore, was conducted in violation of his 4th Amendment rights and the decisions of this Court in *Chemil* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685; *Vale* v. *Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409; *Shipley* v. *California*, 395 U.S. 818, 89 S.Ct. 2053, 23 L.Ed.2d 732; *Stoner* v. *California*, 376 U.S. 483, 84 S.Ct. 889, 891, 11 L.Ed.2d 856.

3. The motion for judgment of acquittal, made by defense counsel at the close of the Government's testimony, should have been sustained for there was no evidence introduced at the trial showing that petitioner had possession, or possession with intent to distribute, a controlled substance.

4. The Court's Instruction No. 7 to the effect that the jury could not consider the lesser included offense unless the jury unanimously found the petitioner "not guilty" of the greater offense was erroneous, and constituted plain error, depriving defendant, your petitioner, of a fair trial and due process in violation of his 5th, 6th and 14th Amendments to the Constitution of the United States.

5. The trial court erred in not sustaining defendant, petitioner's, Motion for Judgment of Acquittal, made at the close of the evidence; and in overruling defendant, petitioner's, Motion for New Trial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The 4th and 14th Amendments to the Constitution of the United States; 21 U.S.C., Chapter 13, particularly Section 21; and 21 U.S.C. 841 and 842; and 21 U.S.C. 844.

STATEMENT OF THE CASE

On July 25, 1972, Park M. Cantner, a detective of the Kansas City, Missouri Police Department, signed a Complaint before a United States Magistrate at Leavenworth, Kansas charging one Maurice Wheeler with having on June 6, 1972, at 3071 Cissna, Kansas City, Kansas, possession, with intent to distribute, heroin, in violation of 21 U.S.C. 841(a)(1) (Sup. Record on Appeal, Vol. 1, page 1). An arrest warrant was issued on the Complaint by the Magistrate for Maurice Wheeler. Maurice Wheeler was later arrested in the United States Court House in Kansas City, Missouri, on the Warrant, August 1, 1972 (Sup. Record on Appeal, Vol. 1, page 2). The Complaint against Maurice Wheeler was dismissed on motion of the United States Attorney before Robert H. Miller, a United States Magistrate at Kansas City, Kansas, August 14, 1972. No further proceedings were had against Maurice Wheeler.

On July 26, 1972, Federal officers (D.A.L.E. Agents) and Kansas City, Missouri police (8 in number) came to the residence of Herman Lee Petty and his wife, Mary Petty, at 3071 Cissna, Kansas City, Kansas, looking for Maurice Wheeler, but before going to the Petty home, Robert Thomas Lawton, a D.A.L.E. Agent, ascertained and determined that other people than Maurice Wheeler lived in the house at 3071 Cissna (Record on Appeal, Vol. 2, pp. 2 to 7). Eight officers arrived at the house, Agent Lawton knocked at the front door and shouted: "Federal

Officers". At or near the same time Herman Petty exited the back door, ran down a flight of steps at the rear of his home, and entered his basement through the rear door with a brown paper sack in his hand. Agent James W. Eapmon, who had been assigned to watch the rear door of the house, entered the basement in pursuit of Mr. Petty. As Agent Eapmon entered the basement Mr. Petty said he would give up. Agent Eapmon then commanded Petty to stand up; he did so, and Agent Eapmon frisked Mr. Petty and walked him out of the basement to the back yard where the agent could see him.

When asked his name, Mr. Petty identified himself as Herman Petty. About that time, other officers arrived at the rear of the Petty residence, and Mr. Petty was turned over to one of them.

Agent Eapmon returned to the basement to search for Maurice Wheeler, who was not there. However, D.A.L.E. Agent Schull entered the basement before Agent Eapmon re-entered the basement after taking Mr. Petty outside. At the trial (April 16th, 1973) Agent Eapmon testified that he was still looking for Maurice Wheeler, but apparently he did not know or forgot that the Complaint against Maurice Wheeler had been dismissed by the United States Magistrate on motion of the United States Attorney on August 14, 1972, some eight months before the trial.

Agent Schull, while in the basement, found a brown paper bag in the top tire of several tires that were on top of a table or box. After finding the brown paper bag, Agent Schull placed it on top of the tires. From there Agent Eapmon took the brown paper bag into his possession. It contained a measuring spoon, two small medicine bottles (one of which was labeled "Methodone") and a few gelatin capsules. Chemical analysis disclosed that there was no heroin in the brown paper bag.

The area under the back porch is not fully excavated and can be reached from the basement. Under the back porch, on a concrete block, sticking out of a pile of dirt, Agent Eapmon, while searching, found a plastic "Baggy" containing another plastic "Baggy" containing tinfoil-wrapped papers containing a brown powder which was analyzed as heroin.

Agent Eapmon testified that he did not know if the brown paper bag, found in the tire in the basement, was the one Mr. Petty carried to the basement, and that he did not see the plastic bag or "Baggy" in the possession of Mr. Petty (R. on Appeal, Vol. 4, p. 108).

Prior to the trial, a motion to suppress all evidence secured by the Government in the search of the Petty home was filed on the ground the search was made without a warrant, was not incident to an arrest, was unreasonable, and violated Mr. Petty's 4th Amendment rights.

At the hearing on this motion, Agent Eapmon testified that the brown paper bag was sitting on top of the tires in plain view and that the plastic "Baggies", containing the tinfoil-wrapped heroin, was found in dirt under the back porch, which was accessible from the basement; and that they were within a short distance from where Mr. Petty had been. The witness further testified that he did not see the plastic "Baggies" in possession of Herman or Mary Petty, and he did not know how the "Baggies" got under the porch. The Court overruled the motion on the ground that the brown paper sack was in plain view and that the officers had a right to be in a position to view and seize the objects, and that the objects provided ample, probable cause for the arrest of Mr. and Mrs. Petty, and overruled the motion to suppress. (Mr. Petty had been arrested and taken from the basement prior to the time the objects were found.) The order overruling the

motion to suppress is in Volume 6 of the Record on appeal, at pages 4 to 7.

At the trial it was disclosed that the testimony at the pretrial suppression hearing as to the brown paper bag, being in plain view, was erroneous for the trial evidence disclosed that it was not in plain view; that it was in the inside of the top tire in the stack of tires on a table or box in the basement, and that another officer removed it from the tire, placed it on top of the stack of tires where Officer Eapmon testified he found it. The motion to suppress evidence was renewed at the trial, and the fact called to the court's attention that the brown paper bag was not in plain view, but was taken from a tire by one of the officers and handed to the other, but the Court denied the motion to suppress; and both the brown paper bag and the plastic "Baggies", including the tinfoil wrapper paper and contents were introduced in evidence against Mr. Petty and his wife, Mary Petty.

There was no evidence introduced at the trial that Mr. Petty possessed, or used heroin or other controlled drugs, or that he distributed controlled drugs.

Agent Eapmon further testified that he did not know if the brown paper bag, found in the tire, was the same brown paper bag Mr. Petty carried when he entered the basement; and there was no heroin found in the brown paper bag; and that he never saw Mr. or Mrs. Petty in possession of the plastic "Baggies"; and, further, he does not know how they got in the basement (R. on Appeal, Vol. 4, p. 108).

Officer Schull, who found the brown paper bag in the tire, testified that it was his understanding that there was no heroin in the brown paper bag.

Officers Eapmon and Schull were the only witnesses at the trial for the Government except the Chemist.

The Court of Appeals in its opinion states that the Plain View Doctrine did not apply to the articles seized in the basement of the Petty home, but concludes that the total circumstances of the incident justified a special search for the brown paper bag and that the search was reasonable in light of the action taken projected against the total posture of the case.

It is petitioner's contention that if the officers wished to search incident to Mr. Petty's arrest, that they should have done so before he was removed from the basement of his home to the yard, not afterwards.

The decision of the Tenth Circuit is in conflict with the decisions of this court in *Chemil* v. *California* (*supra*); *Vale* v. *Louisiana* (*supra*); *Shipley* v. *California* (*supra*) and *Stoner* v. *California* (*supra*), and with its own decision in *United States of America* v. *Goad*, 426 F.2d 86 (Tenth Circuit) wherein the defendant was arrested and placed in a patrol car before the search of his home. The Tenth Circuit there held that the search would be illegal and not incident to arrest; and further held that under such circumstances it cannot be said that the officers were in the house as an incident to Goad's arrest.

To the same effect is the case of *United States* v. *Holsey*, 414 F.2d 458 (Tenth Circuit) wherein the defendant was arrested outside of his house and thereafter the officers searched the house, which search was held not to be incident to arrest. The court also said the search was bad in the *Holsey* case under the pre-*Chemil* standards.

In the trial of the petitioners, the jury had to speculate that petitioners had possession and control of a controlled substance, for there was no evidence that Herman Petty

was in possession of or had been in possession of a controlled substance or was previously connected with narcotics in any way. The jury also had to speculate further that Mr. Petty had possession of a controlled substance with intent to distribute the same for there was no evidence whatsoever to that effect.

The burden of proof of possession and intent to distribute rests on the government, for it retained the burden beyond a reasonable doubt to prove each element of the offense, i.e.: possession and intent to distribute. *U. S.* v. *Clark*, 475 F.2d 240 (C.A. N.Y. 73); *U. S.* v. *Lopez*, 461 F.2d 499 (C.A. Fla. 72); *U. S.* v. *Lowry*, 456 F.2d 341 (C.A. Tex. 72). In *Geuara* v. *U. S.*, 242 F.2d 745 where marihuana cigarettes were found on the floor of defendant's automobile half way between driver's seat and passenger's seat, it was held that there was insufficient evidence of possession of the marihuana cigarettes to support conviction of unlawful possession thereof. The court further held that the jury must not be left to speculate and surmise in a criminal case.

The court in its Instruction No. 7 stated: The crime charged in the Indictment includes the lesser offense defined by 21 U.S.C. 844, which reads as follows: "(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance, . . ." If the jury should unanimously find either of the defendants "Not Guilty" of the crime charged in the Indictment, then the jury must proceed to determine the guilt or innocence of the particular defendant under consideration as to the lesser offense defined in Section 844 above.

In connection with this instruction we call the court's attention to Vol. 2, Wright's Federal Practice, Section 515: Rule 31(c), permitting a jury to find defendant guilty of a lesser offense necessarily included in the offense

charged, is a restatement of prior law. *Berra* v. *U. S.*, 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013. * * * "It can be beneficial to the defendant, however, since the jury may temper justice with mercy by acquitting defendant of the offense charged and finding him guilty of the lesser offense." *Stevenson* v. *U. S.*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980.

Petitioner submits that the evidence in this case is insufficient to sustain a conviction of your petitioner; the jury convicted both your petitioner and his wife; but the court set the conviction aside and discharged the wife for the reason that the evidence was insufficient to convict her of possession of a controlled substance with intent to distribute. The court should have discharged both petitioner-defendant and his wife; but let the conviction stand as to petitioner which we contend is erroneous and constituted plain error.

We also contend that the court erred in not sustaining defendant-petitioner's motion for judgment of acquittal at the close of all of the evidence, for the jury could convict only on speculation due to insufficiency of the evidence to establish the crime charged in the Indictment.

For the reasons hereinbefore stated petitioner submits that a Writ of Certiorari should issue to review the decision of the United States Court of Appeals, Tenth Circuit in the cause of United States, Appellee v. Herman Lee Petty, Appellant, No. 73-1582.

Respectfully submitted,

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APPENDIX TO PETITION FOR CERTIORARI

OPINION OF THE COURT OF APPEALS

(Filed May 28th, 1974)

This case probes the overall reasonableness of a warrantless search of a portion of defendant's residence made under very unusual circumstances.

Eight narcotics agents acting under federal direction and under the authority of an arrest warrant for one Maurice Wheeler proceeded to the defendant's home where it was believed Wheeler could be found. Four agents went to the front door, announced themselves as federal officers and demanded entrance. The defendant, a Negro, thereupon rushed out the back door carrying a small brown paper bag, was met and ordered to halt by the other agents, and then turned and ran into the basement of the home through the outside and only entrance to the basement. Neither Wheeler nor defendant was known to the officers although Wheeler was known to be a Negro.

Agents followed defendant into the dark basement and using flashlights found him lying in a pile of dirt. He immediately surrendered, was frisked without incident or result, and was escorted to the custody of other agents in the back yard. He no longer had the brown paper bag. He satisfied the officers that he was not Wheeler but was kept in detention.

Two of the officers then continued to search the basement and ultimately found the brown bag, which contained spoons, powders and capsules, inside the casing of an old tire and also some baggies in or on a cinder block at the border of the basement. Field tests of the substances

showed positive for heroin in the baggies and positive for cocaine in the contents of the brown bag. The latter test was shown to be in error although a minute residue of heroin was on the spoon. Defendant and his wife were then formally arrested for possession of heroin in violation of 21 U.S.C. §841(a)(1) and were subsequently convicted after a jury trial. The trial court set aside the judgment against Mrs. Petty. The sole appellate issue is whether the fruits of the search were properly admitted into evidence.

We have no hesitancy in agreeing with defendant that the discovery of narcotics was not a routine incident of the right of the officers to search the premises for the presence of Wheeler. Nor do we disagree with the contention that the evidence was not seizable under the plain view doctrine.[1] Our determination is thus limited to a consideration of the total circumstances of the incident as justifying a specific search for the brown bag which defendant had secreted in the basement. The reasonableness of this search must be weighed as part of an on-the-spot development of a basically legal police action.[2] Law officers cannot, of course, use the shield of an authorized procedure to justify abortive actions violative of the fourth amendment when the procedural safeguards to the privacy of an individual may be maintained. But law enforcement does not always proceed routinely, as

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1. At the hearing on a pretrial motion to suppress the trial court held otherwise. The testimony at that hearing was that the witness found the brown bag on top of the tires. At trial it developed that it had been placed on top of the tires by another officer, not testifying at the hearing, who had discovered it inside the casing. We leave any possible criticism of the government in this regard to the trial judge.

2. It is not disputed that the officers were lawfully on the Petty premises with the right to enter the home to execute the Wheeler warrant. This right presupposes a reasonable belief that Wheeler was present in the home.

the actions of defendant in the case at bar dramatically illustrate. The exigencies of the occasion may well dictate the necessity of immediate action and the ultimate test is the reasonableness of that action taken projected against the total posture of the occasion. Counsel have been unable to refer us to any case which, in principle or comparable fact, we consider determinative in the case at bar. Nor has our own research proven fruitful although we consider the views of Mr. Justice Clark, speaking for the District of Columbia Circuit in United States v. Brown, 467 F2d 419, to be persuasive.

In *Brown*, as in the instant case, federal officers were attempting to serve an arrest warrant and entered the residence of another to effectuate the arrest, not to search. There, as here, a person fled the premises and the officers thereafter searched the premises discovering narcotics and firearms both in plain view and concealed. The D. C. Circuit held that the right of privacy protected by the Constitution was not unreasonably impaired.

We reach the same conclusion in the case at bar. The officers faced a continuing and dangerous situation without knowledge of what or who was in the dark basement. Their interest and concern reasonably focused on the missing brown bag both as a danger to their lawful activity to locate Wheeler and as an independent factor of a crime developing before their eyes. We agree with the comment of the trial court that to require the officers to pause in their continuing and dangerous exposure to obtain a search warrant "would be the height of preposterousness." We hold that the search was made with probable cause in view of the peculiar and total circumstances of the case and consequently the judgment is

AFFIRMED.

PETITION FOR REHEARING IN BANC

To the Honorable United States Court of Appeals, Tenth Circuit:

The petition of the complainant-appellee for a rehearing in banc of the appeal herein is based on the following grounds:

1. The Indictment in this cause charges:

"On or about July 26, 1972, in the District of Kansas, and within the jurisdiction of this court,

Herman Lee Petty

Mary A. Petty

a/k/a Mary A. Moore

possessed with intent to distribute a controlled substance, to-wit: heroin, a Schedule I controlled substance, in violation of Section 841 (a) (1), Title 21, United States Code." Appellant was found guilty by the jury as charged, notwithstanding that there is no evidence in the record that appellant was in possession with intent to manufacture, distribute or dispense a controlled substance (Heroin).

In U. S. v. Clark 475 F2d. 240 (C. A. N. Y. 73) the court held that in a prosecution for possession of heroin and cocaine with intent to distribute, the government retained the burden of proof beyond a reasonable doubt of each element of the offense including the intent to distribute. Besides contending there was no evidence that appellant was in possession of the brown paper bag introduced in evidence when he went into the basement, there was evidence that the witnesses for the government did not know whether or not the brown paper bag taken from inside a tire was the same one that appellant is accused

of taking to the basement, nor that the brown paper bag taken from inside the tire was the only brown paper bag in the basement. In other words there was a failure to prove that the brown paper bag introduced in evidence was the one taken by appellant to the basement, this the officer testified he did not know. Nor is there evidence that the government witnesses searched for other brown paper bags, although they did find plastic baggies containing what the chemist said was heroin; but likewise there is no evidence that the plastic baggies were in the possession or under the control of appellant. There was no evidence whatsoever that the essential element, ie: that appellant intended to distribute heroin, was proven; for on this point there is a lack of evidence from which the jury could conclude that the appellant possesses heroin with intent to distribute it; for under the indictment the government had the burden of proving that the appellant possessed heroin with the intent to distribute it, U. S. v. Lopez 461 F2d. 499 (C. A. Fla. 72).

In U. S. v. Lowry 456 F.2d. 341 (C. A. Tex. 72) it was held that former section 176 a of 21 U. S. C. which provided that possession of marihuana shall be deemed sufficient evidence to authorize conviction unless defendant explained possession to the satisfaction of the jury was held unconstitutional.

In the Petty case there is no proof, directly or circumstantial of a sale or gift, or intent to sell or give away the controlled substance, hence the ingredient of the alleged crime of possession with intent to distribute is lacking, and the defendant is entitled to a reversal of the judgment of the trial court.

2. The court in its instruction No. 7 (Record on Appeal Vol. 6 page 18) instructed the jury that it could convict the defendant of the lesser offense of possession under 21

U. S. C. 844, but the jury did not do so but found defendant guilty of the greater offense charged, ie, possession of heroin with intent to distribute; but due to lack of evidence of intent to distribute the verdict finding defendant guilty of the greater offense cannot stand, so we contend the cause should be reversed, and defendant discharged, of the offense set forth in the indictment.

3. Appellant by reference to the contentions set forth in his brief and reply brief hereby incorporates the contentions made therein the same as though herein set forth at length.

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT a rehearing and reargument of this appeal be granted.

Respectfully submitted,
/s/ Thomas E. Joyce

SUPPLEMENT TO PETITION FOR REHEARING IN BANC

Appellant supplements his Petition for Rehearing In Banc by adding thereto an additional ground as follows:

4. Agent James W. Eapman testified that he was covering the back of the house as other agents knocked on the front door, that appellant came running out of the back door when the other agents knocked at the front door, and that he ran into the basement, that agent Eapmon went into the basement after him, and appellant said that he would give up. Eapmon then frisked appellant and took him out of the basement to the yard, where appellant was turned over to other officers, appellant identified himself as Herman Lee Petty. Agents Eapman and Shull then entered the basement (Vol 4 page 53 to 55) Officer Shull found the

brown paper bag introduced in evidence in the inside of a tire, and placed it on top of the tire, on cross examination he testified:

Q. Okay. But you are not telling them (the jury) that that's the brown paper bag that Petty brought into the basement, is it?

A. I don't know that it's the same one he carried into the basement, no, sir.

Q. As a matter of fact, you testified that it was under that porch, I think, that you found the little white Baggies. (Reference is to the back porch.)

A. Yes, sir, it was.

The search for the brown paper bag according to the evidence was conducted after appellant was taken from the basement, therefore it was subsequent to and not contemporaneous with appellants presence in the basement, and was a warrantless search. We therefore contend that the search was illegal and contrary to the holdings of the Supreme Court in, Vale vs. Louisiana 90 S. Ct. 1969; Shipley vs. California 395 U. S. 818, 89 S. Ct. 2053; Stoner vs. California 376 U. S. 483, 84 S. Ct. 889, 891. Under these decisions the search of a dwelling without a search warrant is illegal and the search is also illegal and void as not incident to a lawful arrest and also void for the reason that the search was subsequent to the time appellant was removed from his dwellinghouse.

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT a rehearing and reargument of this appeal be granted, and that leave be given to supplement the briefs on file; or that the decision be vacated and the cause remanded to discharge the appellant.

Respectfully submitted,

/s/ Thomas E. Joyce

June 21, 1974

Thomas E. Joyce, Esq.
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Re: No. 73-1582, U.S.A. v. Herman Lee Petty
Dear Mr. Joyce:

Enclosed is a certified copy of an order denying your petition for rehearing, with suggestion for rehearing en banc.

Very truly yours,

/s/ Howard K. Phillips
Clerk

ORDER DENYING PETITION FOR REHEARING

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Lewis, Seth and Holloway to whom the cases were argued and submitted.

The petition for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

/s/ Howard K. Phillips
Clerk

MANDATE OF THE COURT OF APPEALS

(Filed July 5, 1974)

This cause came on to be heard on the record on appeal from the United States District Court for the DISTRICT OF KANSAS and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is AFFIRMED. It is further ordered by this court that HERMAN LEE PETTY, appellant, surrender himself to the custody of the United States Marshal for the DISTRICT OF KANSAS in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

/s/ Howard K. Phillips
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2039

HERMAN LEE PETTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his basement violated the Fourth Amendment, that the evidence was insufficient to support his conviction, and that the trial court's instruction on the lesser included offense was erroneous.

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted[1] on one count of an indictment charging him with possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of five years' imprisonment, to be followed by a special term of three years' probation. The court of appeals affirmed (Pet. App. A).

[1]Petitioner's wife and co-defendant, Mary Petty, was also found guilty of the same offense. The trial court, however, set aside her conviction (Pet. App. A2).

The evidence showed that on June 6, 1972, an informant purchased heroin from one Maurice Wheeler at 3071 Cissna, Kansas City. On July 26, 1972, government agents went to that address with a warrant for Wheeler's arrest (H. 2-3).[2] Several agents approached the front door of the residence, while others went around to the rear of the house. Agent Robert Lawton knocked on the front door and identified himself. Mrs. Petty then exclaimed "federal agents" and, after a momentary delay, opened the front door (H2., p. 4).

Agent James W. Eapmon, who was at the rear of the residence, heard Agent Lawton knock and identify himself, and a voice inside the house shout "federal officers." The rear door then swung open and petitioner ran from the house carrying a small brown paper bag. The agent shouted "police officer," whereupon petitioner turned and ran into the basement of the residence (H. 4). The officer again called to him to halt and then, followed by Agent Benjamin E. Shull, went down the steps leading into the basement. Petitioner then surrendered and submitted to a frisk. The brown paper bag, however, was not found in his possession.

After leaving petitioner with other agents, the officers re-entered the basement (H. 7). Agent Shull saw a brown paper bag sticking out of a tire[3] (Tr. 121). He opened the bag and found several bottles of white powder and drug-related paraphernalia (measuring spoons, gelatin capsules,

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[2]"Tr." refers to the transcript of the trial, which took place April 17, 1973. "H." refers to the transcript of the testimony of James W. Eapmon at the suppression hearing held October 13, 1972. "H2" refers to the transcript of the testimony of Robert Thomas Lawton at the suppression hearing held October 13, 1972.

[3]Agent Eapmon testified at the suppression hearing that he had discovered the bag lying on top of a stack of tires (Tr. 14). At trial, however, he stated that he believed that it was actually Agent Shull who had "initially found" the bag (Tr. 56). Agent Shull then testified that indeed it was he who had discovered the bag (Tr. 121). The defense thereupon renewed its motion to suppress the evidence seized. After hearing argument, the court held that the search was constitutionally permissible (Tr. 138-146), and the court of appeals agreed (Pet. App. A3).

and a bottle cap with a wire handle) (H. 8, Tr. 122-123). The officers then observed a plastic bag lying on a cinder block nearby. Inside the bag, they discovered a tin-foil wrapped package containing brown powder. Field tests indicated that the white powder was cocaine and that the brown powder was heroin.[4] Petitioner and his wife were then placed under arrest (Tr. 60).

1. Petitioner contends that the warrantless search of his basement was not incident to an arrest, and that it therefore violated the Fourth Amendment. However, petitioner misconstrues the nature of the search. We submit that the search was incident to petitioner's arrest because the search occurred within an area which was in reach of petitioner when he was apprehended.[5] See *Chimel* v. *California*, 395 U.S. 752, 766. It is clear that the agents had probable cause to arrest petitioner even before narcotics paraphernalia were discovered. The agents knew that narcotics transactions had occurred on the premises. Upon their announcement that "federal officers" were present, petitioner immediately ran from the house carrying a small brown paper bag. When one agent shouted "police officer" to him, petitioner turned and ran into the basement. He did not stop when the agents shouted for him to halt.

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[4]Later tests revealed, however, that while the brown powder was heroin, the white was not cocaine but a quinine and lactose substance commonly used to cut heroin (Tr. 162). The brown powder was found to contain 4.78 grams of heroin, enough to make approximately 470 dosage units for street sale (Tr. 160).

[5]*Vale* v. *Louisiana*, 399 U.S. 30, relied upon by petitioner, is not controlling, since in *Vale* the defendant was apprehended on the front steps of his house and the subsequent search comprised the entire house. Here, in contrast, petitioner was apprehended in the basement of the house, and the subsequent search took place in the immediate area in which he was apprehended.

The agents who followed him into the basement discovered petitioner crouching under the porch, approximately ten feet from the basement door (Tr. 54). Had they wished, the agents could, under the rule enunciated in *Chimel, supra,* then make a warrantless search of the immediate area in which petitioner was found. The paper bag was discovered within some tires which were stacked approximately halfway between the basement door and the porch (Tr. 121)—clearly within petitioner's reach when he was apprehended and therefore within the proper scope of the search. The plastic bag likewise lay within petitioner's reach, on a cinder block under the porch where he was apprehended (Tr. 84). Since a search of the tires would therefore have been permissible at the time petitioner was arrested, the agents could lawfully first secure his person by removing him from the basement prior to making the search. *Chambers* v. *Maroney,* 399 U.S. 42.

Moreover, exigent circumstances required that the agents undertake the search immediately, rather than wait until they had obtained a search warrant. Because they knew that narcotics transactions had occurred on the premises, and they had seen petitioner run from the house with a paper bag when they announced their presence, the agents had reason to believe that the paper bag contained evidence of narcotics. They knew that at least one other person—Mrs. Petty—was in the house, and there was a real possibility that she or other individuals who might be hiding in the house would attempt to destroy the evidence. Had the agents staked out the house and detained its occupants until a warrant was obtained in order to assure that the evidence was not destroyed, the resulting intrusion upon Fourth Amendment rights would have been arguably greater than that resulting from the warrantless search. See *Chambers* v. *Maroney, supra,* 399 U.S. at 51-52; see also *Warden* v. *Hayden,* 387 U.S. 294, 298-299. Under these circumstances, the warrantless search was reasonable even if not viewed as incident to petitioner's arrest.

2. Petitioner contends that there was no evidence that he either possessed or intended to distribute narcotics. He therefore asserts that the trial court erroneously denied his motions for acquittal and a new trial.

There was sufficient evidence, however, from which the jury could reasonably infer that petitioner had possession of narcotics and intended to distribute them. Police found heroin in petitioner's basement after apprehending him there. They also discovered material and equipment commonly used to prepare heroin for use. Petitioner was apparently attempting to hide the drug-related paraphernalia when he was found by investigating officers. The heroin removed from the basement amounted to 4.78 grams, from which approximately 470 dosage units could be made for street sale (Tr. 160). See *United States* v. *Echols*, 477 F. 2d 37 (C.A. 8), certiorari denied, 414 U.S. 825; *United States* v. *Johnson*, 469 F. 2d 973 (C.A. 5); *United States* v. *Ortiz*, 445 F. 2d 1100 (C.A. 10), certiorari denied, 404 U.S. 993. Moreover, no evidence was adduced that petitioner or his wife was an addict. See *United States* v. *Echols*, *supra*.

3. Petitioner contends that the trial court erred in instructing the jury that if it should "unanimously" find him "not guilty" of the crime charged, only then should it proceed to determine his guilt or innocence as to the lesser included offense of possession (Tr. 214). Petitioner did not request that a lesser included offense instruction be given (Tr. 224). Although the court provided defense counsel with a copy of the proposed instruction prior to charging the jury, counsel at no time objected to the instruction.[6]

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[6]Defense counsel did object to the instruction as it applied to petitioner's wife, Mary Petty, but on grounds that there was no evidence that she even possessed the narcotics in question (Tr. 191, 224).

Petitioner's contention seems, therefore, to rest upon the proposition that, even without a request for a lesser included offense instruction, due process requires that a jury be permitted to consider a lesser included offense without first concluding that the defendant is innocent of the offense charged. Petitioner has failed, however, to cite any authority for this proposition and we know of none. Moreover, since there was no objection made to the instruction, it cannot constitute grounds for reversal unless there was "plain error". which, we submit, did not occur here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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